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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT WILSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

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No. 49A02-0603-CR-265

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 17
The Honorable Carol Orbison, Judge
Cause No. 49G17-0512-CM-222272

March 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Robert Wilson, was convicted of Domestic Battery as a Class A misdemeanor.¹ Upon appeal, Wilson argues that the trial court abused its discretion in admitting evidence of prior charges filed against him which were ultimately dismissed. Wilson maintains that the admission of such evidence violated Indiana Rule of Evidence 404(b).

We affirm.

The facts most favorable to the conviction reveal that Wilson and his wife, Karina (“Wife”), married on April 17, 2004 and had two children together. At some point Wilson and Wife separated, but they began living together again on December 25, 2005. A few days later, on December 29, 2005, Wilson became “violent” and “abusive” towards Wife. Transcript at 36. Wilson cursed at Wife, called her a “bitch,” hit her, and refused to let her leave for work when she asked him to do so. Transcript at 36. That day, Wife attempted to call the police four times before she was able to reach them. Wife first attempted to call the police from an upstairs bedroom, but Wilson pulled the phone cord from the wall. Wife then went to her daughter’s bedroom and attempted to use the telephone, but Wilson followed her and “yanked that phone out.” Transcript at 39. Wife’s third attempt to call the police from a kitchen phone was interrupted when Wilson pulled the phone cords out of the wall. Wife continued to plead with Wilson to leave, and when Wilson went to the laundry room to retrieve his shoes, Wife ran to an upstairs bedroom but was again followed by Wilson. Wilson continued to curse at Wife,

¹ Ind. Code § 35-42-2-1.3 (Burns Code Ed. Repl. 2004).

and then he grabbed her arms, threw her on the bed, and began hitting her with his fists and kicking her while wearing his work boots. Wife begged Wilson to leave, and he eventually went downstairs, where he continued to pace and kept “going off.” Transcript at 42. While Wilson was downstairs, Wife went into her son’s room where she had previously hidden a phone “just in case anything was to ever happen.” Transcript at 43. Wife dialed 911 but did not say anything to the operator who answered. Wife called 911 a second time and pretended that she was calling her mother because Wilson was nearby and had told her that if she called the police it would “be the last time.” Transcript at 43, 48.

As Wife contacted the police, Wilson grabbed a knife from the kitchen and told Wife that he was going to cut and scratch himself and tell the police that she had done it to him. Wilson then used the knife to scratch his face, causing slight bleeding near his eye. Police arrived at the home about five minutes after Wife called 911 and took Wife and Wilson into separate rooms to speak with them separately and figure out what had transpired. After speaking with Wife and Wilson, the police determined that Wilson was the aggressor and placed him under arrest. Officer William Scaggs noted that Wife “looked upset” and had a fresh bruise on her thigh and another bruise on her forearm. Transcript at 100. Officer Scaggs also noticed a small abrasion below Wilson’s right eyelid, a small cut on his right wrist, and a small spot on his left wrist, which Wilson claimed were caused by Wife.

Wilson testified that Wife was the aggressor and that she had followed him around the home, lunged at him, and caused him injury. Wilson also claimed to have placed the

first 911 call and explained that he did not speak to the operator because Wife grabbed the telephone. Wilson denied hitting, slapping, or pushing Wife.

During the trial, Wife testified to the events recounted above. Over Wilson's objections, Wife was also permitted to testify as to three earlier incidents occurring between her and Wilson.² Specifically, Wife testified that on August 21, 2004, Wilson grabbed her by the neck and started strangling her during an argument. Wife also testified that during this incident, Wilson took her head and hit it up against the living room wall, causing Wife to drop the baby in her arms. Wife further testified that police were called to investigate the incident, and charges were filed against Wilson. Additionally, Wife testified that during another argument occurring on December 5, 2004, Wilson cut her with a knife. The third incident occurred the following day, December 6, 2004, when, in a parking lot outside of a doctor's office, Wilson blocked Wife from getting her son out of the car by pushing her. Wife reported these two incidents to police, and charges were subsequently filed against Wilson. Upon cross-examination, Wife admitted that the charges resulting from each of these incidents were dismissed because Wife failed to appear in court even though she had been subpoenaed. Wife also admitted that Wilson had a protective order against her that was in effect on December 29, 2005.

² On February 23, 2006, the State filed a notice of intent to offer evidence pursuant to Rule 404(b), specifically noting the three prior instances. On February 27, 2006, the day before trial, the court held a hearing to determine the admissibility of the 404(b) evidence the State wished to offer. A transcript of this hearing was not included in the record before us. Quite apparent from the record before us, however, is that the trial court concluded that the evidence of the prior incidents was admissible. When the State offered such evidence during the trial, Wilson objected presumably upon grounds argued to the court during the hearing the day before.

As a result of the December 29 incident, the State charged Wilson with domestic battery and battery, both as Class A misdemeanors. A jury trial was held on February 28, 2006, at the conclusion of which the jury found Wilson guilty of both counts. The trial court entered a judgment of conviction only as to the domestic battery charge, finding that the battery charge “merged” therewith.

Upon appeal, Wilson argues that the trial court abused its discretion by admitting evidence over his objection regarding the incidents resulting in charges filed against him which were ultimately dismissed, asserting that such evidence was inadmissible under Indiana Rule of Evidence 404.

Evidence Rule 404(b) provides that otherwise inadmissible evidence of prior wrongs or bad acts may be admissible to prove “motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” In assessing the admissibility of evidence under Rule 404(b), we must determine (1) whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged acts; and (2) whether the probative value of the evidence outweighs the prejudicial effect pursuant to Indiana Evidence Rule 403. Holden v. State, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004), trans. denied. We will review a trial court’s decision to admit such evidence for an abuse of discretion. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997).

The State argues, as it did before the trial court, that the evidence of prior acts of domestic abuse, even though the charges stemming from such incidents were later dismissed, was admissible to prove motive and intent and to demonstrate Wilson’s

hostility toward Wife. In support of its argument, the State directs us to Spencer v. State, 703 N.E.2d 1053 (Ind. 1999). In Spencer, our Supreme Court held that the trial court did not abuse its discretion in admitting evidence of prior batteries against the victim. Id. at 1056. The evidence of prior violence included incidents, one of which led to the filing of a report, one of which led to an arrest, and one of which resulted in a conviction. Id. at 1055. In finding no abuse of discretion, the Court noted that “where a relationship between parties is characterized by frequent conflict, evidence of the defendant’s prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime—‘hostility.’” Id. at 1056.

Under the second prong for determining admissibility of the evidence under Rule 404(b), the Spencer Court noted that two of the three prior incidents occurred more than three years prior to the charged crime, and thus concluded that the probative value of such evidence was diminished by the passage of time. Id. The Court held, however, that the evidence concerning the incident of violence which occurred within two years of the charged act of murder retained sufficient probative force to support the trial court’s conclusion that the probative value outweighed the prejudicial effect of such evidence.³ Id. The Court, although indicating that it may have found the evidence to be inadmissible if it had been in the shoes of the trial court, could not say upon appellate review that the trial court abused its discretion in finding the evidence to be admissible. Id.

³ This incident involved an arrest but not a conviction. We therefore conclude that Spencer does not stand for a proposition that a conviction is essential to the admissibility of evidence of the prior incident.

Here, the record reveals that Wilson and Wife had a troubled relationship. Wilson testified that their relationship was “on and off” and that they “had differences since the beginning of [their] marriage.” Transcript at 142. Wilson and Wife were separated after less than two years of marriage. Further bearing upon the nature of their relationship, the evidence of the prior incidents demonstrates the hostile nature of the relationship between Wilson and Wife. Such evidence is relevant to motive in the present case. As has been noted before, hostility is ““a paradigmatic motive for committing a crime.”” Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997) (quoting United States v. Russell, 971 F.2d 1098, 1106-07 (4th Cir. 1992)).

Turning to the second prong for assessing admissibility of evidence under Rule 404(b), we note that the prior incidents occurred in August and December of 2004, that is, within eighteen months of the incident giving rise to the present offense and shortly after Wilson and Wife married. The probative value of such evidence was not diminished by the passage of time. Rather, such evidence was highly probative of the hostile nature of their relationship during the short duration of their marriage and clearly outweighed any prejudice to Wilson.⁴ Under the facts of this case, we find the rationale of Spencer, persuasive, and we cannot say that the trial court abused its discretion in admitting the evidence regarding the prior incidents of abuse.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

⁴ We further note that the trial court gave a final instruction informing the jury that evidence that Wilson was involved in wrongful conduct other than that charged was to be considered only for the purpose of establishing motive.